SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. 346

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WATCHTOWER BIBLE AND TRACT SOCIETY, INC.
Petitioner

v.

COUNTY OF LOS ANGELES, CALIFORNIA,
CITY OF LYNWOOD, CALIFORNIA, and
E. L. BYRAM, COUNTY TAX COLLECTOR
Respondent

□

Petition for Writ of Certiorari
to the Supreme Court of the State of California

HAYDEN C. COVINGTON
Counsel for Petitioner

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Petition for Writ of Certiorari to the Supreme Court of the State of California

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Watchtower Bible and Tract Society, Inc., presents this its petition for writ of certiorari and shows unto the Court as follows:

Summary of Matters Involved

1. *Preliminary Statement.*

The facts and problems here presented to this Court are similar to those involved in *Murdock* v. *Pennsylvania,* 319 U. S. 105, and *Follett* v. *McCormick,* 321 U. S. 573.

2. *Opinion of the Court Below.*

The opinion of the Supreme Court of California is reported at 182 P. 2d 178. It appears in the record. [20-25] [1]

3. *Statutory Provisions Sustaining Jurisdiction.*

The jurisdiction of this Court rests on Section 237 (b) of the Judicial Code, 28 U. S. C. 344 (b).

4. *Timeliness of the Petition.*

The judgment of the Supreme Court of California was entered on July 1, 1947. [20, 26, 27] The petition for writ of certiorari is filed within three months from the date of the entry of such judgment in said court.

5. *State Statute Involved.*

No California statute is directly challenged in this case. The constitutionality of an ad valorem tax assessed against and collected from the petitioner, pursuant to the statutes of California, is here drawn in question.[2]

6. *Constitutional Provisions Involved.*

The First and Fourteenth Amendments to the United States Constitution protecting fundamental freedoms are relied upon.

[1] Numbers appearing herein in brackets refer to pages in the printed record in this case.

[2] The tax was imposed and collected pursuant to Sections 106, 201, 401, 2151, 2602 and 2903 of the California Revenue and Taxation Code.

7. *Questions Presented.*

ONE

Is the tax, sustained by the courts below, unconstitutional because it abridges freedom of press and freedom to worship ALMIGHTY GOD, contrary to the First and Fourteenth Amendments to the United States Constitution?

TWO

Is the tax imposed upon literature used by the petitioner, a society of missionary evangelists for door-to-door preaching, while that literature is temporarily stored at the petitioner's distribution depot located in Los Angeles County, an abridgment of freedom of press and freedom to worship ALMIGHTY GOD, contrary to the First and Fourteenth Amendments to the United States Constitution?

8. *How Issues Raised.*

In a complaint duly filed in the Superior Court of Los Angeles County petitioner challenged the validity of the taxes on the ground that they abridged petitioner's rights of freedom of speech, press and worship, contrary to the First and Fourteenth Amendments to the United States Constitution. [6-7, 9, 11, 12] The Superior Court and the Supreme Court of California sustained the validity of such taxes and held that the assessment and collection thereof did not abridge petitioner's rights contrary to the First and Fourteenth Amendments. [15, 20-25]

The federal questions were duly raised in the trial court [1-11] and in the Supreme Court of California. [20-25] Such federal questions were considered and decided adversely to petitioner by the Supreme Court of California. [20-25]

9. *Nature and History of Action.*

The foregoing questions to be decided are duly raised by allegations made in the complaint for declaratory judgment and for refund of the taxes [10], and the defendants' demurrer [13] which was sustained by the court. [16-17] Petitioner took an appeal from such ruling adversely deciding each of the questions above presented to the California Supreme Court. [17] The California Supreme Court considered such constitutional questions and overruled petitioner's contentions. [20-25]

10. *Summary of Facts Alleged.*

It is alleged that the Watchtower Bible and Tract Society, Inc., is a foreign corporation organized under the Membership Corporations Law of the State of New York for religious purposes, with its principal place of business in the City of New York, Borough of Brooklyn. [1]

It is alleged that said religious society has a permit to do business in the State of California. [2]

It is further alleged that said society is used exclusively for preaching purposes by that group of missionary evangelists known as Jehovah's witnesses, who by said society are guided, aided and assisted in preaching the gospel of the Kingdom of ALMIGHTY GOD.

It is alleged that the society owns property known as 3345 Fernwood Avenue, Lynwood, California, which is used exclusively for chartered purposes of said society and for religious worship through maintenance there of a depot where literature of the society is stored. [3] The complaint alleges that the literature stored on said premises relates to explanation of Bible prophecies and true Christianity, being printed sermons on Bible subjects used by missionary evangelists of said society in missionary fields in California as substitutes for oral sermons in their door-to-door preaching work. [3-4] The complaint says that the literature stored on the premises is printed at the society's headquarters in

Brooklyn and shipped to the depot at Lynwood and from there reshipped to missionary evangelists representing the society in various missionary fields in California. The society alleges that the depot on the premises is used merely as a point for distribution of literature to its missionary evangelists to keep them supplied with printed sermons to carry on their worship from house to house in California. [3, 6]

The complaint alleges that the stock of literature is constantly changing because of shipment from the society's headquarters to the depot and from the depot to missionary evangelists in their respective assigned territories throughout California. [3, 4-5]

The complaint alleges that none of the literature temporarily stored at said premises is sold for profit or for a commercial objective, said literature being distributed only to missionary evangelists representing the society. It is alleged that the full-time missionaries obtain the literature from the society at less than cost, and the part-time missionary evangelists contribute to the society a stipulated sum to cover cost of publication and shipment of the literature they received. [5] In this connection it is alleged that no officer, member, or representative of said society receives profit from operations of the society, such persons being confined to a reasonable cash allowance for incidental personal expenses while engaged in effectuating one or more of the chartered purposes of the society. [6]

The complaint alleges that the personal property and literature located at such depot are used exclusively for the worship of Jehovah's witnesses and for religious purposes of said missionary evangelists representing the society. [3-4, 10]

The complaint further alleges that the society duly requested the county tax assessor for the exemption of said real and personal property pursuant to Constitutions of

California and the United States, which request was refused. [6-8]

The society further alleges that it duly filed in writing a claim for exemption of said premises and personal property, including said literature, from taxation under Article XIII, Section 1½ of the California Constitution, which claim was referred to the County Board of Equalization for hearing on July 13, 1945. [7] It then alleges that on said hearing the said equalization board granted exemption on the real property because of its exclusive use for religious worship to the extent of ninety (90%) percent of the assessed valuation thereof.[3] [7-8] The equalization board denied the society its claimed exemption upon said personalty, including the literature. [7-13]

It is alleged that pursuant to said denial of the claimed exemption the personal property, including said literature, was placed upon the assessment roll for $9,000 and thereafter the tax collector mailed a tax statement to the society demanding payment of the sum of $425 for taxes assessed against said literature and personalty used exclusively for purposes of worship upon said premises. [8]

It was further alleged that the action of said equalization board in denying claimed exemption for said literature stored on said premises constituted an abridgment of petitioner's rights of freedom of speech, of press and of worship,

[3] The reason for denial of exemption to the extent of ten (10%) percent of the value of the realty was, apparently, because the house located on said premises was deemed not exempt because used solely for the purpose of housing the ministers working on said premises and therefore came within classification of a parsonage and hence was not exempt under Article XIII, Section 1½ of the Constitution.

contrary to the First and Fourteenth Amendments to the United States Constitution. [9, 11]

The taxes assessed and billed, together with interest and penalties in total amount of $463.97, were alleged to have been duly paid. [9-10] It is alleged that the written protest filed with the tax collector pursuant to Section 5137 of the California Revenue and Taxation Code specified the invalidity of the tax because (a) the literature and personal property were used exclusively for religious purposes and worship, and therefore were exempt from taxation under Article XIII, Section 1½ of the California Constitution [9-10]; and (b) the literature was used exclusively for the purpose of preaching the gospel of the Kingdom of ALMIGHTY GOD by the society and its missionary evangelists and therefore the tax constituted an undue burden upon and abridgment of the rights of freedom of speech, of press and of worship, contrary to the California Constitution and the First and Fourteenth Amendments to the United States Constitution [10]; and (c) the County Board of Equalization acted arbitrarily and capriciously and in excess of its authority when it authorized the assessment of said personalty, contrary to Article XIII, Section 1½ of the California Constitution. [10-11]

The complaint prays for a declaratory judgment, stating the invalidity of the taxes on the grounds hereinbefore enumerated, and requests a judgment for return of the $463.97 paid under protest together with interest at the rate of five (5%) percentum per annum. [11-12]

Reasons Relied on for Allowance of Writ

The decision of the court below is out of harmony with and conflicts with the decisions of this Court in *Richfield Oil Corporation* v. *State Board of Equalization,* 67 S. Ct. 156, *Murdock* v. *Pennsylvania,* 319 U. S. 105, *Follett* v. *McCormick,* 321 U. S. 573, and *Grosjean* v. *American Press Company,* 297 U. S. 233.

The decisions of the courts below have so far departed from the ordinary and usual course of judicial proceedings as to require a consideration thereof by this Court and a reversal of the court below so as to halt the same.

In the event this Court fails to find that there is a conflict between the decision of the court below and the decisions of this Court, then petitioner says that the validity of an ad valorem personal property tax imposed against literature is an important federal constitutional question which has not been, but which should be, decided by this Court.

WHEREFORE petitioner prays that this Court issue a writ of certiorari to the Supreme Court of California directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the judgment of the said Supreme Court

of California, affirming the judgment, be here set aside and the cause remanded to the court below for further proceedings consistent with opinion written herein; and that petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

WATCHTOWER BIBLE AND TRACT SOCIETY, INC.
Petitioner

By HAYDEN C. COVINGTON
Counsel for Petitioner

BRIEF

in Support of Petition for Writ of Certiorari

Specification of Errors

Petitioner assigns the following errors in the record and proceedings of said cause:

1. The Superior Court erred in sustaining the demurrer to petitioner's complaint and ordering the complaint dismissed after petitioner refused to amend the complaint.

2. The Supreme Court of California erred in affirming the judgment of the Superior Court.

3. The courts below erred in failing to hold that the assessment and collection of the taxes abridged petitioner's rights of freedom of speech, press and worship, contrary to the First and Fourteenth Amendments to the United States Constitution.

ARGUMENT

The taxes are invalid because they abridge freedom of press and freedom to worship ALMIGHTY GOD, contrary to the First and Fourteenth Amendments to the United States Constitution.

The petitioner duly attacked the assessment as being invalid because abridging the rights of freedom of press and worship, contrary to the First and Fourteenth Amendments to the United States Constitution, in the letter of protest accompanying the payment of the tax. In the complaint petitioner alleges that the taxes were invalid for the same reasons. The trial court was requested to properly construe the statute, so as not to authorize the imposition of the tax against the literature. the court rejected the requested construction and construed and applied Sec-

tions 106, 201, 401 and 2151 of the California Revenue and Taxation Code as authorizing the assessments. Petitioner contends that the construction makes the statute unconstitutional, because it abridges freedom of press and freedom to worship ALMIGHTY GOD, contrary to the Federal Constitution. The record in this case and the holding of the courts below properly present to this Court the question of whether the tax assessed is unconstitutional.

The petitioner is entitled to rely upon the rights guaranteed to persons within the United States under the Constitution. While a corporation is not entitled to protection under the "privileges and immunities" clause of the Federal Constitution, it is a person within the meaning of the "due process" clause of the Fourteenth Amendment which carries forward the guarantees of the First Amendment to the United States Constitution. *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244.[4]

Therefore, inasmuch as the literature in question was owned by the plaintiff society, a nonprofit corporation, which is the legal governing body of Jehovah's witnesses, it has as much right to rely upon the constitutional provisions guaranteeing freedom of press and worship in its assertion that the taxes are invalid as would the individual natural persons, Jehovah's witnesses, rely upon such provisions if they were parties to the action.

Storage of the literature in question while en route from headquarters of the society to its missionary evangelists in various parts of California is a necessary step in the process of preaching the gospel of God's kingdom. The message as preached by Jehovah's witnesses may be likened unto

[4] See also Louis K. Liggett Co. v. Baldridge, 278 U. S. 105; Massachusetts v. Mellon, 262 U. S. 447; Home Ins. Co. v. New York, 134 U. S. 594; Covington & L. Turnpike etc. v. Sanford, 164 U. S. 592; Smyth v. Ames, 169 U. S. 522; Douglas v. Jeannette, 319 U. S. 157.

a flowing stream of ideas conveyed in words on printed pages issuing constantly from presses of the society, and which flows to people of good will who desire to receive the literature in millions of homes of the nation, including California.

The taxing of any step in the process of printing, publishing and distributing literature is an unconstitutional abridgment of freedom of the press. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Follett* v. *McCormick*, 321 U. S. 573; *Vermont* v. *Greaves*, 112 Vt. 222; *McConkey* v. *Fredericksburg*, 179 Va. 556.

Freedom of the press is not confined to the mere printing of literature. It embraces also circulation. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." Ex parte *Jackson*, 96 U. S. 727, 733; see also *Lovell* v. *Griffin*, 303 U. S. 444, 452.

Storage of the literature at the Lynwood depot by the society is as much a part of the process of circulation as is the handing of a piece of literature by one of the missionary evangelists to a person, as the evangelist moves from door to door in his assigned territory. Without a place to store literature the liberty of printing and distributing it would be of little, if any, value. The distributor of literature cannot carry with him on his person all of the literature which he uses in his preaching business. Of necessity he must keep an operating reserve in large quantities at some place, to be drawn upon from time to time in his process of distributing literature from door to door. Undoubtedly the imposition of a tax against the storage of literature by the individual missionary evangelist would be an unlawful abridgment of freedom of speech, press and worship, contrary to the named constitutions. Certainly a state could not tax the literature reserve that a missionary evangelist might keep in his automobile used by him in the

servicing of his missionary field. The state could not tax the literature which a missionary evangelist might have stored at his home or in his garage or in a private storage place rented by him.

Since the state concededly cannot tax the literature stored by the individual missionary evangelist, then *a fortiori,* the state cannot lawfully tax the literature stored by two or more missionary evangelists working together and jointly. If the state cannot tax the stored literature of one evangelist, or of two, three or more missionary evangelists operating jointly, then, by force of the same reason, the state cannot lawfully impose a tax upon literature stored by a society of missionary evangelists, which literature is commonly used by the large group or society of missionary evangelists in their joint action of preaching.

Storage of the literature at the Lynwood depot by the society is a mere convenience, essential to effective distribution of the literature. It is true that the literature could be shipped directly from the society's headquarters at New York to the individual missionary evangelists in their respective territories. However, that is not necessary because it imposes upon the society an unnecessary financial burden. It makes more costly, hence burdensome, the distribution of the literature by the missionary evangelists.

In an analagous situation of commerce, this Court has held that the business of stevedoring, loading and unloading ships was such a vitally necessary step in the process of foreign trade that it could not be taxed by the state. *Joseph* v. *Carter & Weekes Stevedoring Company,* 67 S. Ct. 815, 817, 818. In that case the Court said: "The movement of cargo off and on the ship is substantially a continuation of the transportation. . . . The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of

the safety and convenience of the transportation itself."

Also reference is made to the dissent of Mr. Justice Douglas in that case at 67 S. Ct. 827. There he said: "Loading and unloading are a part of 'the exporting process' which the Import-Export Clause protects from state taxation. See *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19, 27. Activity which is a 'step in exportation' has that immunity. . . . And the gross receipts tax is an impost on an export within the meaning of the Clause, since the incident 'which gave rise to the accrual of the tax was a step in the export process.' *Richfield Oil Corp.* v. *State Board, supra.*"

Storage of literature for redistribution to evangelists for final delivery to the people of California is as necessary a step in the process of petitioner's publishing as is the stevedoring step in the process of shipping in foreign commerce. Accordingly it should have the same exemption from taxation.

The entire flowing stream of publication must be kept open, pursuant to the mandate of the Bill of Rights and the Constitution of the United States. The protecting shield of the Bill of Rights in the Constitution extends from that stream's source to its termination, which is the delivery of the literature to the millions of recipients thereof throughout the nation, including California. The Bill of Rights in the Constitution forbids the state's erecting a dam or barrier at any point along the flowing stream of publication, which begins with printing and ends with delivery of such literature to persons of good will at their homes or publicly upon the streets of the nation.

Publication, as a stream aflow, is kept alive by the continuing and uninterrupted gliding of literature from the printing presses to the people. If at any point the stream is dammed, it will stagnate, resulting in disease and death to the vital freedom as well as to those entitled to enjoy it.

Certainly none would have the audacity to argue that

the storage of literature is not a part of the process of publishing. Can any say that the storage of literature is not a step or vital essential of the publishing process viewed as a whole and which, streamlike, must course smoothly and continuously from the printing presses to the people? The people cannot be required to stand at the printing press. Liberty of press does not end at the printing press. The people have the right to receive the literature at their homes and upon the streets of the nation. How can they receive it if they cannot have someone to deliver it to them? How can the deliverer of the literature effectively distribute it unless he has an abundance of literature to distribute? How can he have an abundance of literature to distribute unless he has a place to store it?

The mere uttering of all these questions against the sounding-board of reason reverberates the answer that storage of literature is a vitally essential part of the process of circulation of literature. Since circulation cannot be burdened by taxation, no part of the process of circulation can be impeded or stagnated by taxation.

Every school child knows that the forefathers fought valiantly until they cast off and out from this land taxation of freedom as the favorite yoke of oppression. That method of abuse and prohibition of the freedom of the press was without question of doubt more clear in the minds of the framers of the First Amendment than any other sort of encroachment.

"The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times." [5]

[5] MURPHY, J., in Thornhill v. Alabama, 310 U. S. 88. See, also, Duniway, *The Development of Freedom of the Press in Massachusetts*, p. 123 et seq.; Tyler, *Literary History of the American Revolution;* 2 Bancroft, *History of the United States*, p. 261; Schofield, *Freedom of the Press in the United States* (1914), 9 Proc. Am. Social. Sec. 67, 76, 80.

At the time of the American Revolution that was the favorite and best known means of oppression.[6]

The term "abridge" as here used from the First Amendment means "to shorten, curtail or reduce" and comes from the same root word as "abbreviate". It does *not* mean 'destroy, forbid, prohibit, prevent.'

It cannot be contended that the tax here is not included within the prohibition of the First Amendment. The tax is more pernicious than even the ancient stamp tax because it is an arbitrary tax providing for an amount which must be paid for keeping in one's possession literature, and does not depend upon income or profit of the individual. It does not make allowance for those engaged in charitable activity where most of the items are delivered free of charge. No provision is made for any reduction in amount of tax on account of the number of pieces given away free of charge. The tax is therefore the worst kind of burden or abridgment.

In *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819), it is said: "The power to tax is the power to destroy." That destructure is a grim and appalling reality in the instant case.

This entire question of the tax being an unconstitutional burden upon rights guaranteed by the Bill of Rights can, we submit, be disposed of on that single, lone milestone of constitutional law and judicial history.

It has always been the universal rule of the courts that when a tax is found to be proper and constitutional upon a given activity such tax cannot be attacked as a "substantial clog" or excessive. Once it is decided that a tax can be

[6] For historical discussion of these oppressive taxes, see Grosjean v. American Press Co., 297 U. S. 233; Near v. Minnesota, 283 U. S. 697, 707-716. See, also, W. G. Bleyer, *The History of American Journalism,* 1927 ed. 1129; G. J. Patterson, *Free Speech and a Free Press,* 1939 ed.; W. M. Clyde, *The Struggle for the Freedom of the Press from Caxton to Cromwell,* 1934 ed.; C. D. Collet, *History of Taxes on Knowledge,* 1899 ed.; Ford, *Pamphlets on the Constitution of the United States,* 1787-1788, pp. 113, 156-157, 316 (1888); *Pennsylvania and the Federal Constitution* (McMaster and Stone, Eds.), pp. 180, 181, 576 ff. (1888); Stevens, *Sources of the Constitution of the United States,* pp. 213, 218, 221 (1894); Stewart, *Lennox and the Taxes on Knowledge,* 15 Scottish Hist. Rev. 322, 326.

imposed upon the right to print, publish, store, circulate or distribute printed matter or to preach the gospel, as did Christ Jesus and His apostles, then there is no limit to this power of taxation and complete control, suppression, and prohibition. Destruction of the four freedoms can readily result.

The courts have repeatedly pointed out that when a subject matter is brought under the taxing power of the federal, state or municipal government, the amount—regardless of how destructive or prohibitive it may be—cannot be questioned by the judiciary. There is no limit to its exercise within the discretion of the government, state or city. The oppressiveness of the burden cannot interdict the taxation. *Magnano Co.* v. *Hamilton,* 292 U. S. 40; *Stewart Dry Goods Co.* v. *Lewis,* 294 U. S. 550.

In *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548, the validity of an increased tax on the circulating notes of persons and state banks was questioned as excessive. The court refused to consider the question and said: "The first answer to this is that the judiciary cannot prescribe to the legislative departments of the government limitations upon its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution." See also "Child Labor Tax Case", 259 U. S. 20, 41; *McCray* v. *United States,* 195 U. S. 27; *Spencer* v. *Merchant,* 125 U. S. 345; *Flint* v. *Stone Tracy Co.,* 220 U. S 107.

In *Associated Press* v. *N. L. R. B.,* 301 U. S. 103, 132, it is said that "The publisher of a newspaper . . . like others . . . must pay equitable and non-discriminatory taxes on his business." The court below erroneously simulated this case to the facts in the case of *Giragi* v. *Moore,*

301 U. S. 670, and *Arizona Publishing Co.* v. *O'Neil*, 304 U. S. 543. The decisions in both those cases are not in point and do not sustain the decision of the court below. However, in event this Court finds that the decisions in the *Giragi* and *Arizona Publishing Company* cases are applicable, then petitioner says that this Court should reconsider and clarify the effect of its decision in *Giragi* v. *Moore*.

In that case the State of Arizona levied a tax of one per cent upon the gross receipts of various businesses in the state, including the newspaper publishing business, and required every person engaged in a business subject to such tax to obtain a license or else suffer fines and penalties.

An examination of the record in the *Giragi* case will show that the contention that the tax there involved was in violation of the Fourteenth Amendment was first raised on motion for rehearing before the Supreme Court of Arizona. Until that motion for rehearing no federal question had been raised. Consequently, when the record came before this Court on appeal, it was deficient in failing adequately to show in what respects the tax constituted a restraint upon the press.

This Court therefore dismissed the appeal in a per curiam decision for want of a substantial federal question. *Giragi* v. *Moore*, 301 U. S. 670. But the matter was disposed of on a jurisdictional statement only and the per curiam decision was not accompanied by an opinion explaining the relation of *Grosjean* v. *American Press Co.*, 297 U. S. 233, and *Associated Press* v. *N. L. R. B.*, 301 U. S. 103, to the issue involved. Petitioner believes therefore that the true character and effect of a tax such as that in the *Giragi* case has never been fully considered by this Court.

Nor was the true character and effect of the tax fully considered in *Arizona Publishing Co.* v. *O'Neil*, 304 U. S. 543, where this Court on appeal affirmed the judgment of the District Court of the United States for the District of Arizona upholding the same tax statute as in the *Giragi*

case. This case was also decided on the jurisdictional statement and in a per curiam decision which needs clarification.

Since the *Giragi* and *Arizona Publishing Company* decisions this Court made it plain in *Lovell* v. *Griffin*, 303 U. S. 444, that the First Amendment safeguards liberty of circulation as well as liberty of publication. The petitioner believes that in the light of the *Lovell* and subsequent cases the statute in the Arizona cases was as clear a violation of the freedom of the press as is the tax in the present case.

Those engaged in "press activity", such as the newspapers and other publishers, are not exempt from ordinary forms of taxation. They are required to pay various types of taxes, federal and state, including net income taxes, capital stock taxes, social security taxes, corporate franchise taxes, real and unemployment compensation taxes. All these are the ordinary form of taxation. But because the public press can be required to pay ordinary forms of taxation, one could not successfully contend that such newspapers and publishers could be required to pay a tax upon the distribution of their literature or the printing thereof.

Things used which are necessary to the enjoyment of the rights guaranteed by the First Amendment are as strongly protected from taxation as are things that move in foreign commerce protected against taxation by the Import-Export Clause of the Constitution. Therefore the ad valorem personal property tax assessed against the literature in this case is as invalid as was declared to be the ad valorem personal property tax assessed against the oil stored in *Richfield Oil Corp.* v. *State Board of Equalization*, decided November 25, 1946, 67 S. Ct. 156. In that decision, Mr. Justice Douglas, among other things, said:

"Article I, Section 10, Clause 2 of the Constitution provides that 'No State shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, . . .' [¶] . . . It is suggested, however, that the

history of the Import-Export Clause shows that it was designed to prevent discriminatory taxes and not to preclude the levy of general taxes applicable alike to all goods. . . . The qualified interpretation urged upon us has therefore no substantial support in the history of the Import-Export Clause. . . . [¶] . . . We cannot, therefore, read the prohibition against 'any' tax on exports as containing an implied qualification. . . . [¶] The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. . . . [¶] The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves. That is true of the constitutional prohibition against federal taxes on exports. . . . [¶] We conclude that the tax which California has exacted from appellant is an impost upon an export within the meaning of Article I, Section 10, Clause 2, and is therefore unconstitutional." (67 S. Ct. 156, 159, 160, 161, 163, 165)

The court below relied upon the loose statements of this Court found in *Murdock* v. *Pennsylvania,* 319 U. S. 105, and *Follett* v. *McCormick,* 321 U. S. 573. [24, 25] This was dictum and not a holding of this Court.

The dictum relied upon from the *Murdock* case is as follows: "We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed with those activities." 319 U. S. 105, 112 [24]

The dictum relied upon from the *Follett* case is as follows: "The exemption from a license tax of a preacher

who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property." 321 U. S. 573, 577-578. [25]

It is submitted that the court below misinterpreted the dictum from these two decisions by this Court. When this Court said that one engaged in the exercise of freedoms of speech, press and worship was liable for the payment of taxes on property, certainly the court did not mean to say that such taxes could be imposed on *all* property.

The basic fallacy of the decision of the court below is that since the literature is "property" it is not protected by the guarantees of freedom of press and worship. In this respect the conclusion reached by the court below is factitious. Through syllogism, beginning with false premises, the court below has reached a conclusion that removes literature entirely from the protection of freedom of the press and worship. Thus the hand of the clock has been turned back centuries to the time when literature was banned and taxed because of the novelty thereof. In that day the rulers, like respondents, were unable to recognize literature as a necessary basic part of the fundamental freedoms of the people. The ghost phrase that 'personal property is not exempt from taxation' has been used by the respondents to obscure the real vice of the taxes imposed against freedom of press and worship in this case.

The mere fact that literature is personal property does not withdraw it from the protecting shield of the Bill of Rights. The broad and general terms of the Bill of Rights, protecting freedoms of speech, press and worship, are flexible. They protect any device which is necessary and directly used in order to properly exercise the rights guaranteed in the fundamental compact.

The prohibition against abridgment of the rights of freedom of speech, freedom of press and freedom of worship by taxation is not limited to privilege taxes and license

taxes. It extends to all kinds of taxes that directly burden the exercise of the right when imposed. "No one could doubt that taxation which may be freely laid upon activities not within the protection of the Bill of Rights could—when applied to the dissemination of ideas—be made the ready instrument for destruction of that right. . . . [¶] The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary the Constitution, by virtue of the First and Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it. . . . [¶] . . . The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws. It is true that the constitutional guaranties of freedom of press and religion, like the commerce clause, make no distinction between fixed-sum taxes and other kinds. But that fact affords no excuse to courts, whose duty it is to enforce those guaranties, to close their eyes to the characteristics of a tax which render it destructive of freedom of press and religion." *Jones* v. *Opelika,* 316 U. S. 584, 608, 609-610, Mr. Chief Justice Stone, dissenting. This dissenting opinion was made the basis of the decision vacating the judgment resulting from the majority opinion and ordering the judgment of the state courts reversed. *Jones* v. *Opelika,* 319 U. S. 103, 104.

The appellation of the court below that the literature is mere "property" should not blind the Court and cause it not to see the real issue presented in this petition. It is restraint and abridgment of the freedom that is prohibited by the First Amendment irrespective of the name that may be given the thing that claims the protection or the

characterization placed upon the instrument of worship. "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name." *Cummings* v. *Missouri,* 4 Wall. 277, 332.

There is absolutely no connection or analogy between the long line of decisions relied upon by respondents in the court below which approve the imposition of taxes upon rolling stock of railroads and airplanes of air lines engaged in interstate commerce and the imposition of a tax against the property in this case. These vehicles of transportation are clearly subject to taxation. Certainly petitioner does not argue that the automobiles used by its missionary evangelists are exempt from the ad valorem property tax of California or the payment of automobile license tax fee required in the registration of automobiles.

The literature used in preaching the gospel of God's kingdom by Jehovah's witnesses is protected from taxation by the First Amendment. The automobile is not. It is not necessary. The literature is necessary. It is the article that gives life to the press activity protected by the Bill of Rights. It is a product and result of freedom of the press.

Certainly, respondents would concede that goods shipped in commerce are themselves free from taxes while in transit over interstate commerce lines. The literature protected by the Bill of Rights against taxation is as free from the ad valorem taxes as is goods in interstate transit.

The principle announced by this Court in the case of *Nippert* v. *City of Richmond*, 327 U. S. 416, applies here rather than the rolling stock cases relied upon by respondents. In that case Mr. Justice Rutledge said: "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the trans-

portation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local', and thus achieve its desired result. . . . [¶] It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. . . . [¶] . . . With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against. . . . [¶] The drummer is a figure representative of a by-gone day. But his modern prototype persists under more euphonious appellations. So endure the basic reasons which brought about his protection from the kind of local favoritism the facts of this case typify." *Nippert* v. *City of Richmond*, 327 U. S. 416, 423, 431, 434, 435.

It is submitted, therefore, that the tax imposed against the literature is unconstitutional and void because the right of petitioner to freedom of press and of worship is abridged, contrary to the First and Fourteenth Amendments to the United States Constitution.

Conclusion

WHEREFORE the Supreme Court of the United States should grant the petition for writ of certiorari because the court below disposed of important and substantial federal questions in a way that is in conflict with the Constitution of the United States and applicable decisions of the nation's highest court, and has so radically and far departed from the Constitution of the United States and the accepted sound course of judicial procedure as to call for exercise by the Supreme Court of the United States of its power of supervision and review to halt the same.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 366

WATCHTOWER BIBLE AND TRACT SOCIETY,

Petitioner,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA, CITY OF LYNWOOD, CALIFORNIA, and H. L. BYRAM, County Tax Collector,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAROLD W. KENNEDY,
County Counsel,
and
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Deputy County Counsel,
Attorneys for Respondents.

WESTERN PRINTING COMPANY, WHITTIER

TOPICAL INDEX

TABLE OF CASES AND AUTHORITIES CITED

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A.

Statement of Facts

The facts in the case are recited in the decision of the California Supreme Court as follows:

"Plaintiff is a corporation organized by Jehovah's Witnesses, a religious sect, to assist in fos-

tering their creed. Plaintiff owns real property in defendant county upon which buildings are situated. This property is used for religious purposes. (An exemption was claimed and allowed for that real property pursuant to the Constitution (Cal. Const., Art. XIII, sec. 1½) and no dispute exists with reference to it.) Plaintiff owns and stores in one of said buildings pamphlets, books and other literature which are used by it and the Jehovah's Witnesses in the exercise of their religion and for proselyting purposes. The buildings being the distribution point for said literature. The literature so stored was assessed as personal property subject to taxation. . . . " (Tr. of Rec., p. 20, fols. 39-40.)

"It is a uniform, non-discriminatory tax levied upon all property alike, personal and real, regardless of the use to which it is put, pursuant to the constitutional provision reading: 'All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided.' (Cal. Const., Art. XIII, sec. 1.) . . . " (Ib., p. 20, fol. 43.)

Petitioner paid the tax under protest, (Ib., p. 9, fol. 15) and filed action under statute authorizing suit for the recovery of taxes upon an erroneous assessment, (Cal. R. & T. Code, sections 5136 to 5141) asserting that the property was tax exempt and "that the tax so levied is invalid as a violation of the right of religious liberty and freedom of speech and the press as guaranteed by fundamental law." (Ib., p. 20, fol. 40.)

Judgment in the trial court went against petitioner. The Supreme Court of the State affirmed such judgment and sustained the tax, holding that the same constituted no infringement of constitutional right. Upon the facts the Court further said:

> "There are two important factors bearing upon this problem that should first be considered.
>
> "First, the tax levied here was one solely for the purpose of revenue to defray the general expenses of government, no element of regulation being involved. It is not a license tax—a tax on the exercise of a right, privilege, occupation, calling, or activity, and is payable whether or not the property is used in a commercial profit motive enterprise. Nor does it impose any conditions or restrictions upon the use of the property taxed. It is solely a general *ad valorem* property tax which is the chief source of revenue for the local government." (Ib., p. 22, fols. 42-43.)

B.

The Question Sought to Be Raised in This Case and Upon This Petition

Two questions were involved in the State Court, to wit: (1) as to the liability to the general property tax of petitioner's Bibles, literature and other stored personal property, under the provisions of the California Constitution exempting real property and improvements from taxation if used exclusively for religious worship; (that question of state law is concluded by the adverse determination of the State Court) and (2) as to the liability to the general property tax of petitioner's Bibles, literature and other stored personal property, under the provisions of the First and Fourteenth Amendments of the Federal Constitution assuring freedom of religious worship and of speech and of the press.

The question is so stated by the petition too, although twice repeated as constituting two questions. (Pet., p. 3.) The position of petitioner was stated by the State Court, as follows:

> "The argument advanced by plaintiff in support of its contention that the tax here involved is invalid, is to the effect that a general, uniform, non-discriminatory *ad valorem* property tax for revenue purposes may not be imposed upon the property of a religious organization used by it in the exercise of its religion or worship by reason of the religious liberty guarantee, and, in the in-

stant case, the property consisting of literature, by reason of the guarantee of freedom of speech and press." (Tr. of Rec., p. 22, fol. 42.)

C.

No Present Constitutional Question Is Involved

The petition for *certiorari* should be denied. No present constitutional question is involved. The petition does purport to state a constitutional question. In truth, however, no constitutional question is involved. Actually the only possible constitutional question has been settled. The decisions of this high court have definitely resolved the question and against petitioner. No question of constitutional law longer remains.

D.

The Guaranties of Freedom of Religious Worship and of Speech and of the Press Are Guaranties of Freedom of Action, Not Grant of Exemption From Non-discriminatory Property Taxation.

The guarantee by the First and Fourteenth Amendments to the Constitution of freedom of religious worship and of speech and of the press are assurance of freedom of action or activity, not exemption from equalized and non-discriminatory property taxation. This court has so declared. No debatable or present constitutional question is raised by this petition for *certiorari*. The writ should be denied for two reasons.

(1) The Constitution assures freedom of action in the three specified realms of personal activity, of speech, press and worship, but not in the realm of property or of property ownership free from taxation.

(2) The tax herein protested was not a tax or a levy upon any action or activity, nor an imposition or burden upon any of the three specified freedoms.

The freedoms of speech and of the press and of worship are personal rights and liberties in the three named spheres (1) of speaking, and (2) of writing, and printing and publishing, and (3) of worshipping. These provisions of the Constitution make no declaration and attempt no assurance with regard to property.

The petition merely confuses the nature and scope of these fundamental guaranties when it seeks to apply them to physical properties. The petition fails to analyze what it is that is assured, i. e., the distinction between (1) the assured activity and (2) the mere property used in the activity. A little analysis will show the course of the confusion. The guaranties of freedom of speech and of the press and of worship are guaranties of personal rights. They assure the freedom of the individual and his right to do and to act. Any tax attempted as a condition of or prerequisite to the exercise of such freedom or right would infringe. The guaranty is not a guaranty with regard to property or property ownership—not even with regard to property used or which may be used or which is to be used in the exercise of or in connection with the guar-

anteed activity. Quite mistaken is the petition's idea that "things used which are necessary to the enjoyment of the rights guaranteed by the first amendment are as strongly protected from taxation as are things which move in foreign commerce protected against taxation by the import-export clause of the Constitution." (Pet., p. 19.)

The petition cites the decisions which overturned constraining ordinance or license exaction on itinerant preachers. Such decisions, however, do not support the petition's claim of tax exemption for the stored literature. Such disapproved ordinance or exaction was a restrictive limitation upon the activity and on the freedom of religious worship and of speech. But freedom for religious worship and speech does not mean tax freedom or exemption for the property. The assured liberty, the specified freedoms of thought and action are not infringed by non-discriminatory taxation of property, even though employed in such protected activities.

Non-discriminatory property tax upon the stored literature, even if used in worship, could in no sense be a tax upon any act of worship or of printing or publishing. Yet the petition asserts that a tax on books, as on property employed in worship, is a tax on the act of worship and that a tax upon printed matter is a tax on printing and distributing. Petitioner says:

> "The taxing of any step in the process of printing, publishing and distributing literature is an uncon-

> stitutional abridgement of freedom of the press." (Pet., p. 12.)

Freedom to print or immunity for "the process of printing" embrace neither the machinery nor the materials used in printing, nor the printed product. Yet the petition incontinently argues that whatever makes the distribution of literature more expensive is forbidden.

The petition seeks to see the property tax in question as a tax on an act, to wit, in succession as a tax on printing, on publishing, on distributing, on storing. The petition says:

> "The taxing of any step in the process of printing, publishing and distributing literature is an unconstitutional abridgement of freedom of the press." (Pet., p. 12.)

The attempt to criticize the tax upon printed literature as a tax on the act of printing, or on the act of distributing the printed literature, is merely unconsidered assertion. The tax is a property tax, a tax on the tangible personal property, but not a tax or a burden on any act of printing or publishing or distributing.

Again, dislocating the tax from its actual imposition upon the taxable personal property in order to affix it to an act, to wit, to the act of circulating literature, the petition says:

> "Freedom of the press is not confined to the mere printing of literature. It embraces also circulation. 'Liberty of circulating is as essential to that

> freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' . . . " (Ib., p. 12.)

The petition coins a metaphor, and calls publication a "stream," refers to the "flowing stream of publication," says that "the entire flowing stream must be kept open, pursuant to the mandate of the Bill of Rights and the Constitution of the United States and California." (Ib., p. 14.) Under the euphony of its metaphor the petition asserts that the Constitution's protection "extends from that stream's source to its termination, which is the delivery of the literature to the millions of recipients thereof throughout the nation, including California." (Ib., p. 14.)

Again, in endeavor to affix the tax to something else than to the property, the petition tries to affix it to the storing of the literature. Carried on by the sweep and current of its metaphor, the petition continues:

> "Storage of the literature at the Lynwood Depot by the society is as much a part of the process of circulation as is the handing of a piece of literature by one of the missionary evangelists to a person, as the evangelist moves from door to door in his assigned territory. Without a place to store literature the liberty of printing and distributing it would be of little, if any, value. . . . " (Ib., p. 12.)

Storage is necessary to effective distribution, the petition says:

> "Storage of literature for redistribution to evangelists for final delivery to the people of California is as necessary a step in the process of petitioner's publishing as is the stevedoring step in the process of shipping in foreign commerce. Accordingly it should have the same exemption from taxation." (Ib., p. 14.)

And, again:

> "Certainly none would have the audacity to argue that the storage of literature is not a part of the process of publishing. . . . " (Ib., pp. 14-15.)

What was taxed was not any act, not the act of storing literature, but, instead, the literature itself, the tangible physical property. The power and the right to act (to publish, to store, to circulate, to worship) continued unrestricted and entirely free. The only burden even, was the common burden of equal and nondiscriminatory tax, resting alike on this and all other property.

The argument by the petition seems to follow this course: Major premise, that a tax on any of the protected activities of printing, publishing or distributing literature would be bad. The argument omits the minor premise of its syllogism and leaps from the major premise direct to a conclusion, to wit, that therefore this tax is bad as a tax on one or more of such protected activities. Utterly inapplicable to the facts is the reasoning by the petition.

"Since circulation cannot be burdened by taxation, no part of the process of circulation can be impeded or stagnated by taxation. . . . " (Pet., p. 15.)

The tax is not a tax on the act of circulating or on any act of printing, literature, or on any step or incident connected with any such act. The petition's difficulty is not with its statement of principle. The difficulty is that the tax was not a tax on publishing, printing, distributing or storing, or on any step or process in connection therewith.

The tax upon the stevedoring of ship cargo was unconstitutional taxation of a vital step or activity in foreign commerce, indeed a step and activity in the very exporting process. (*Joseph v. Carter & Weekes,* 67 S. Ct. 815 (Cited Pet., p. 13.) The property tax herein is nothing like such tax upon acts done in the process of transporting and upon incidents in the activity of commerce. Non-discriminatory taxation of literature as personal property is by no possibility taxation of the activity of producing or distributing or storing the literature.

Petitioner must not assert that to be taxed which is not taxed. It is not open to petitioner to assert taxation of the act of speaking, or of printing, publishing or circulating, or of the act of worshipping when, instead, the tax is upon literature in storage. It is no more open to the claimant of a right to declare the incidence of a tax contrary to the fact than it is open

to the claimant of a right to determine that to be worship which by no possibility is worship. Freedom of worship does not excuse polygamy. (*Church of Jesus Christ v. United States,* 136 U. S. 1, 34 L. Ed. 478; *Reynolds v. United States,* 98 U. S. 145, 25 L. Ed. 244.)

Merely asserting that a book or literature is worship cannot constitute such property an act. A book or printed matter is not worship—not an act nor any part or step in the act of preaching, or of the process of worship. It can be at most only an instrument, or a property used in preaching or in worship. A thing is not the protected action. A noun is not a verb.

The petition quotes the striking phrase from *McCulloch v. Maryland* that "The power to tax is the power to destroy," and conjuring up a total threat against all its activities, voices dramatic apprehension that "that destructure is a grim and appalling reality in the instant case." (Pet., p. 16.)

The declaration of the Court in *McCulloch v. Maryland,* is, of course, thoroughly sound that:

> "We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."

The taxing authorities can, however, and must in performance of their duties as public officers determine what it is that is being taxed and whether taxation of the physical instrument employed or the physical

property distributed is taxation of the activity; and what is direct and a burden on the activity, and what is indirect and merely remote.

The petition's consideration of *Nippert v. City of Richmond,* 327 U. S. 416, (Pet., p. 23) points petitioner's confusion in the assertion that "the literature protected by the Bill of Rights against taxation is as free from the *ad valorem* taxes as is goods in interstate transit." (Pet., p. 23.) Goods while in transit are exempt because in interstate commerce. Petitioner's literature at rest and in storage is not in transit, nor is it exempt as the act of publishing or of worshiping. The Court in the *Nippert* case says that a tax upon "some local incident" in the course of interstate commerce constitutes a tax upon the commerce itself. Petitioner seeks to see its taxed literature as an "incident" in worship. An "incident," of course, is a part of an act or happening. The Court in the *Nippert* case speaks of acts and incidents which "take place within the confines of the states" and "incidents occurring within each state," definitely indicating that the Court was talking about acts and happenings and not about physical property.

The petition concedes that

> " . . . the newspapers and other publishers are not exempt from ordinary forms of taxation. They are required to pay various types of taxes, Federal and State, including net income taxes. . . . All these are the ordinary form of taxation." (p. 19.)

Clearly the freedom of speech does not free the printer from tax burdens common to all. The printer is liable to non-discriminatory taxes upon his presses and printer's supplies and materials. Similarly the worshiper is not freed from the common restraints laid upon conduct and behavior. The petition does not avoid the direct applicability of its concession by objection that

> " . . . because the public press can be required to pay ordinary form of taxation, one could not successfully contend that such newspapers and publishers could be required to pay a tax upon the distribution of their literature or the printing thereof." (Pet., p. 19.)

The tax herein was a tax upon property and not upon the act of distributing or printing.

The exemption of property in interstate commerce does not exempt the rolling stock of the railroad. The exclusive jurisdiction of the Federal Government over interstate or foreign commerce does not preclude local taxation of the property employed in such commerce. Freedom from State control does not free from non-discriminatory taxation the railroad cars or vessels or the other physical instruments of such commerce.

Over fifty years ago in *Adams Express Co. v. Ohio St. Auditor* (1896), 165 U. S. 194, 41 L. Ed. 683, this Court said:

> "Although the transportation of the subject of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation,

yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally as all business is affected by the necessity of contributing to the support of government. . . . " (41 L. ed. 695.)

In a later case of the same title in 166 U. S. 185, 41 L. ed. 965, this Court said:

"Again and again has this court affirmed the proposition that no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce. And it has as often affirmed that such restriction upon the power of a state to interfere with interstate commerce does not in the least degree abridge the right of a state to tax at their full value all the instrumentalities used for such commerce." (p. 976.)

In *United States Express Co. v. Minnesota*, 223 U. S. 335, 56 L. Ed. 459, the Court said:

"The right of the state to tax property, although it is used in interstate commerce is thoroughly well

> settled. . . . The difficulty has been, and is to distinguish between legitimate attempts to exert the taxing power of the state and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such. This difficulty was recognized in *Galveston, H. & S. A. R. Co. v. Texas,* 210 U. S. 217, 52 L. ed. 1031. . . . Mr. Justice Holmes, speaking for the court, said:
>
> > " 'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.' . . . " (p. 465.)

In *Pullman's Palace Car Co. v. Commonwealth of Pennsylvania,* 141 U. S. 18, 35 L. Ed. 613, the Court noticed and disposed of an objection of the kind urged by petitioner herein, saying:

> "Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. . . . " (p. 617.)

And the Court said:

> "The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupa-

tion; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its property within the State, is, in substance and effect, a tax on that property. . . . "The cars of this Company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. . . . " (p. 617.)

In *Wells, Fargo & Co. v. Nevada,* 248 U. S. 165, 63 L. Ed. 190, the Court said:

" . . . consistently with the commerce clause of the Federal Constitution, the state could not tax the privilege or act of engaging in interstate commerce, but could tax the company's property within the state, although chiefly employed in such commerce. . . . " (p. 191.)

Murdock v. Pennsylvania, 319 U. S. 105, 87 L. Ed. 1292, too declares the rule, saying:

"A state may not impose a charge for the enjoyment of a right granted by the federal constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce. (*McGoldrick v. Berwind-White Coal Min. Co.,* 309

> U. S. 33, 56-58, 84 L. Ed. 565, 576, 577, 60 S. Ct. 388, 128 A. L. R. 876), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory." (p. 1298.)

As further recognizing and applying the distinction declared in the above mentioned cases, see *Johnson Oil Ref. Co. v. Okla.*, 290 U. S. 158, 78 L. Ed. 238; *Northwest Air Lines v. Minn.*, 322 U. S. 292, 88 L. Ed. 1283; *St. Louis and S. W. Ry. Co. v. Nattin*, 270 U. S. 157, 72 L. Ed. 830.

Breedlove v. Suttles, 302 U. S. 277, 82 L. Ed. 252, upheld the validity of a Georgia statute imposing and requiring payment of a poll tax as a prerequisite to the right to register and vote, as against the contention that it was an infringement of the privileges and immunities assured by the Fourteenth Amendment and the Nineteenth Amendment. The language of the court as to the Nineteenth Amendment and the right to vote is directly applicable here. The Court discredited the very contention made by petitioner herein, saying of the constitutional amendment:

> "Its purpose is not to regulate the levy or collection of taxes. The construction for which appellant contends would make the amendment a limitation upon the power to tax. . . . " (Ib., p. 256.)

And the Court upheld the State statute saying:

> "It is fanciful to suggest that the Georgia law is a mere disguise under which to deny or abridge

the right of men to vote on account of their sex. The challenged enactment is not repugnant to the Nineteenth Amendment." (Ib., p. 256.)

In *Follette v. McCormick*, 321 U. S. 573, 88 L. Ed. 938, the Court pointed the error of Watchtower's claim of immunity from tax herein when it said:

> "The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the Murdock Case, 319 U. S., p. 112. But to say that they like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment had made a high constitutional privilege." (p. 941.)

Petitioner's argument is merely specious. It confuses the protection assured to an activity, in order to claim a gratuity for the property used in the activity. It would convert the tax on the mere property employed into forbidden restriction upon the activity.

The injunction against infringing the liberty of the press (or the circulation of literature) is not injunction against taxation of the property circulated or of property employed in the circulation. Neither is "circulation"; and taxation of such property is not taxation of the activity or of any step in "the process of circulation."

The decision of the California Supreme Court is in accord with these decisions. It says:

"It has never been supposed that the property used in the exercise of the rights of freedom of press or religion is not subject to a uniform tax for revenue imposed upon all alike. It is the general rule that property used in connection with the publication of a newspaper has no special immunity from the general laws. (*Mabee v. White Plains Pub. Co.*, 327 U. S. 178; *Okl. Press Pub. Co. v. Walling*, 327 U. S. 186; *Associated Press v. Labor Board*, 301 U. S. 132.) And instrumentalities used in connection with the press and the publication business are subject to normal uniform general taxation. (*Grosjean v. American Press*, 297 U. S. 233; *Giragi v. Moore* (Ariz.), 58 Pac. 2d 1249, 64 Pac. 2d 819, appeal dismissed 301 U. S. 670, on authority of *Grosjean v. American Press, supra; Arizona Pub. Co. v. O'Neil*, 22 Fed. Supp. 117, affirmed 304 U. S. 543, on authority of *Grosjean v. American Press, supra; 110 A. L. R.* 327; *35 A. L. R.* 7; Thayer, Legal Control of the Press, p. 64.) In the *Grosjean* case the court declared invalid a statute which imposed a license tax, based on gross receipts, for the privilege of engaging in the business of publishing advertisements in any newspaper or publication whatever. There, however, the application of the tax was measured, not by the volume of advertisements, but by the extent of the circulation of the publication in which the advertisements were carried, *showing an express purpose* to penalize certain publishers and curtail circulations. (*Mabee v. White Plains Pub. Co., supra; Okl. Press Pub. Co. v. Walling, supra.*) The court was careful to point out that; 'It is not intended by anything we have said to suggest that

the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

" 'The predominant purpose of the grant of immunity here involved was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. (*Grosjean v. American Press Co., supra,* 250.) The recent cases in the United States Supreme Court have stated a similar rule. In *Murdock v. Pennsylvania,* 319 U. S. 105, the court denounced an ordinance requiring the payment of a license tax as a condition to soliciting as applied to the pursuit of the activities of religious colporteurs, Jehovah's Witnesses, as in the case at bar, in distributing their literature and receiving (at the

will of the distributee) a price therefor. The sole issue as stated by the court was 'the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax *as a condition to the pursuit of their activities.*' (p. 110.) (Emphasis added.) (The tax in the instant case is not a license tax and the payment of it is not a condition to the pursuit of plaintiff's activities.) And the court went on to say: 'We do not mean to say that religious groups and the press are free from all financial burdens of government. See *Grosjean v. American Press Co.*, 297 U. S. 233, 250 (the portion of the Grosjean decision heretofore quoted). We have here something quite different, for example, from a tax on the income of one who engages in religious activities or *a tax on property used or employed with those activities.* It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. . . . It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. Thus, it may not exact a license tax for the privelege of carrying on interstate commerce (*McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 56-58), although *it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not* discriminatory. Id., p. 47, and cases

cited.' (p. 112.) (Emphasis added.) The foregoing limitation on the holding of the majority opinion in the *Murdock* case and the rule applicable here is elucidated to the dissent of Justice Reed: 'Nor do we understand that the Court now maintains that the Federal Constitution frees press or religion of any tax except such occupational taxes as those here levied. Income taxes, *ad valorem* taxes, even occupational taxes are presumably valid, save only a license tax on sales of religious books.' (Op. 129.) In *Follette v. McCormick*, 321 U. S. 573, the same type of ordinance considered in the *Murdock* case was involved and the court again stated the exception applicable in the case at bar as follows: 'This does not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the *Murdock* case, 319 U. S., p. 112. But to say that they, like other citizens, may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege.' (Op. 577.)

"As we have seen the tax here involved is not such a burden on the exercise of religion as to render it invalid. It is not of the character heretofore denounced by the Supreme Court of the United States. While the power to tax may involve the power to destroy it is clear that no such result will be accomplished by the tax here imposed. The

property here involved is required to bear only its share of the burden of the maintenance of the government which is for its protection equally with other property in Los Angeles County. The very liberty invoked is made realistic by the protection afforded by that government." (Tr. of Rec., pp. 23-25, fols. 44-48.)

Conclusion

Four possible considerations may be urged in connection with the freedoms guaranteed by the Constitution, to wit,

(1) As to the protected *Act* (speaking, communicating, printing, publishing, or worshiping).

(2) As to the *materials* used to produce book or newspaper or the like.

(3) As to the *instrument* used in the activity of speech, press or worship (machinery, bibles, books, musical instruments).

(4) As to the *product* (book or newspaper).

The first alone of the foregoing four is the assured personal freedom and liberty. Only freedom as to the specified act is the personal freedom and liberty assured by the Constitution as the right of a free people. The assurance of these personal privileges does not extend to property, nor intend the release of property from tax or other burden. The Constitution assures freedom of action; assures personal liberty

against restraint or limitation. Immunity from nondiscriminatory property tax does not fall within the assurance. Under the decisions there is no longer a question on the point. The petition presents no present or yet subsisting constitutional question. The writ should be denied.

Respectfully submitted,

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